(1) Supreme Court, U.S.
FILED

No. 00 32

JUL 5 2000

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In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

NASHAUN B. QUICK,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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Printed by Authority of the State of Illinois (P.O. 27757—55—6-30-00)

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QUESTION PRESENTED FOR REVIEW

Whether the Confrontation Clause of the Sixth Amendment permits the admission at a defendant's trial of a genuinely self-inculpatory confession of a non-testifying codefendant which also implicates the defendant.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully asks this Court to issue a writ of *certiorari* to the Appellate Court of Illinois, Third Judicial District, to review that court's judgment reversing Respondent's conviction for murder and remanding the case for a new trial, following the Illinois Appellate Court's determination that Respondent's Sixth Amendment right to confront witnesses was violated by the admission of a nontestifying codefendant's statement which inculpated Respondent.

OPINION BELOW

The initial ruling of the Appellate Court of Illinois, Third Judicial District, was an unpublished order issued pursuant to Illinois Supreme Court Rule 23. (See Appendix A). The Rule 23 order was later withdrawn upon the grant of rehearing, and the Illinois Appellate Court subsequently issued a published opinion, which is reported at 308 Ill.App.3d 474, 720 N.E.2d 1137, 242 Ill.Dec. 182 (3rd Dist. 1999). (See Appendix B)

JURISDICTION

The Illinois Supreme Court denied the State's Petition for Leave to Appeal on April 5, 2000. (See Appendix C). No petition for rehearing was filed by Petitioner.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a). This petition for writ of *certiorari* is filed within 90 days of the Illinois Supreme Court's denial of the Petitioner's Petition for Leave to Appeal. The decision of

the Illinois Appellate Court was premised upon federal constitutional grounds and does not rest upon independent state grounds, albeit that a state residual hearsay statute was involved.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

725 ILCS 5/115-10.2, provides that:

> Admissibility of prior statements when witness refused to testify despite a court order to testify
>
> § 115-10.2. Admissibility of prior statements when witness refused to testify despite a court order to testify.
>
> (a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:
>
> (1) the statement is offered as evidence of a material fact; and
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

(b) A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of the statement, including the name and address of the declarant.

(c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

(e) Nothing in this Section shall render a prior statement inadmissible for purposes of impeachment because the statement was not recorded or otherwise fails to meet the criteria set forth in this Section.

STATEMENT OF THE CASE

Respondent, Nashaun B. Quick, was charged with two counts of first degree murder and aggravated discharge of a firearm. (C. 2-4) In addition, two codefendants, Derrick Rhoden and Jeremiah Jamison, also were charged in

the murder of Paul Foster. (R. 3-11). On September 25, 1997, the State of Illinois filed two applications for the grant of use immunity, in order for the State to call Rhoden and Jamison as witnesses in the State's case-in-chief against Respondent. (C. 58-63). On November 24, 1997, the State filed two additional motions, requesting the entry of an order pursuant to 725 ILCS 5/106-2.5 giving Rhoden and Jamison use immunity and ordering them to answer all questions put to them by the prosecutor. (C. 93-94). On December 1, 1997, the motions were allowed. (C. 102-03).

After receiving the grants of use immunity, the codefendants were called by the prosecution to testify at Respondent's trial. (Jamison-R. 356; Rhoden-R. 392). Initially, codefendant Jamison refused to testify, asserting his fifth amendment right not to testify. (Jamison-R. 356-72). As a result, a hearing was held to determine the applicability of 725 ILCS 5/115-10.2 and whether Jamison's statement was substantively admissible against Respondent. (R. 373-87). The trial judge held in abeyance his ruling with respect to the admissibility of Jamison's taped statement pending the opportunity for codefendant Rhoden to testify. (R. 388-89). Rhoden was called, but he too refused to testify, asserting his fifth amendment rights. (R. 392-405). The trial judge again broached the issue of the admissibility of the codefendants' statements under section 5/115-10.2 of the Illinois Code of Criminal Procedure (725 ILCS 5/115-10.2) (R. 438-70), ruling that both statements were admissible. (R. 456-70).

Prior to the resumption of Respondent's trial, Jamison changed his mind, and agreed to testify. (R. 477-78). Jamison took the stand, testified (R. 479-94), and was

subjected to cross-examination by Respondent. (R. 494-509). Codefendant Rhoden remained steadfast in his refusal to testify at Respondent's trial. Initially, the trial judge decided that he would not allow the State to elicit Rhoden's statement since codefendant Jamison had testified to much of what was contained in Rhoden's statement. However, after the State filed a motion for reconsideration, (C. 107-17), the trial judge allowed the State to admit into evidence only those portions of Rhoden's statement pertaining to the type of gun used, the number of shots fired, and the manner in which the shots were fired. (R. 571 et seq.). Those parts of Rhoden's statement were admitted through the testimony of Detective Sullivan. Additionally, Rhoden's assertion identifying Respondent as the shooter also was admitted. (R. 579-84).

The case went to the jury on December 18, 1997. The jury found Respondent guilty of murder (C. 165) as charged in count II, felony murder [720 ILCS 5/9-1(a)(3)] (C. 3). Respondent's post-trial motion (C. 219-72) was denied. (R. 275-332). A sentencing hearing was held on May 8, 1998, resulting in the imposition of a sentence of natural life imprisonment on Respondent. (R. 1176). Respondent filed a timely notice of appeal. (C. 353).

One of the issues raised by Respondent on appeal concerned the propriety of admitting certain portions of the non-testifying codefendant's (Rhoden's) confession at Respondent's trial for murder, arguing that he was denied his right of confrontation as guaranteed by the Sixth Amendment. In affirming Respondent's conviction in an unpublished order, the Illinois Appellate Court rejected Respondent's argument, finding that Rhoden's statement demonstrated sufficient guarantees of trustworthiness,

thereby making it admissible under the State's residual hearsay statute. (App. A at 5-6). However, Respondent filed a petition for rehearing, arguing, *inter alia*, that under this Court's decision in *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), the non-testifying codefendant's confession lacked sufficient guarantees of trustworthiness to be admissible, violated Respondent's constitutional right to confront witnesses against him, and required that Respondent's conviction be reversed and remanded for a new trial. In granting Respondent's petition for rehearing, the Illinois Appellate Court determined that under *Lilly* codefendant Rhoden's confession was erroneously admitted because it lacked the necessary indicia of trustworthiness needed to support its admission at Respondent's trial without providing Respondent an opportunity for cross-examination. (App. B at 20-27). The Illinois Appellate Court also decided that the error was not harmless. (App. B at 27-28). The Illinois Appellate Court reversed Respondent's conviction, and remanded the case for a new trial. (App. B at 28). The Petitioner herein then sought leave to appeal the judgment of the Illinois Appellate Court to the Illinois Supreme Court, which was denied. (App. C).

REASON FOR GRANTING THE WRIT

The non-testifying codefendant's (Rhoden's) genuinely self-inculpatory confession, which evidenced the necessary guarantees of trustworthiness, satisfied the Sixth Amendment Confrontation Clause requirement that to be admissible the hearsay statement need exhibit sufficient indicia of reliability and was properly admitted at Respondent's trial.

Under what, if any, circumstances is a non-testifying codefendant's confession admissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution? As early as *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934 (1965), this Court held that it was error under the Sixth Amendment to admit the confession of a non-testifying codefendant under the guise of cross-examination. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 1623, 20 L.Ed.2d 476 (1968) followed, in which this Court ruled that Bruton was denied his constitutional right of confrontation when a codefendant's confession was admitted at a joint trial without the codefendant ever testifying. Of course, both of these Confrontation Clause decisions were grounded upon the general repugnance to the use of hearsay to obtain a criminal conviction. *Douglas*, 85 S.Ct. at 1077; *Bruton*, 88 S.Ct. at 1623, n. 3. Notwithstanding, Mr. Justice White in dissent in *Bruton*, cautioned against what he perceived as an "excessively rigid rule" whereby all confessions of non-testifying codefendants would be inadmissible *per se*. *Bruton*, White, J., dissenting, 88 S.Ct. at 1629.

In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), drawing upon prior Confrontation Clause precedents, this Court formulated the following general rule, attempting to reconcile the hearsay rule and the Confrontation Clause:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of relia-

> bility." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 100 S.Ct. at 2539.

By its ruling, this Court expressed its rejection of a *per se* ban on the admission of all hearsay at trial, a position which this Court readily has reasserted in subsequent cases. *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987); *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 3164, 111 L.Ed.2d 666 (1990); *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 3150-51, 111 L.Ed.2d 638 (1990). It is the administration of this general principle, as articulated in *Roberts*, which forms the core of the issue presented in Petitioner's instant petition.

The issue presented to this court centers on divining what circumstances would allow a non-testifying codefendant's confession to be directly admissible against a defendant at defendant's trial: what are the specific indicia of reliability or specific guarantees of trustworthiness to which this Court has referred and which this Court would consider adequate under the Confrontation Clause to sanction the admission of the hearsay confession of a non-testifying codefendant at a defendant's trial? We know for certain what these "particularized guarantees of trustworthiness" are not. They are not interlocking facts rooted in defendant's own confession. (*Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 514 (1986); *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 1718-19, 95 L.Ed.2d 162 (1987)). They are not the facts and circumstances which corroborate the details

in the non-testifying codefendant's confession. (*Idaho v. Wright*, 110 S.Ct. at 3150-51; *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 1900-01, 144 L.Ed.2d 117 (1999)). They are not the underlying circumstances indicative of the voluntariness of a codefendant's confession for Fifth Amendment purposes. (*Lee v. Illinois*, 106 S.Ct. at 2064). So then, what are the indicia of reliability or "particularized guarantees of trustworthiness" which would render a hearsay statement admissible?

This Court's most recent pronouncement in *Lilly v. Virginia*, *supra*, reiterated the following rule, derived from *Idaho v. Wright*, *supra*:

> To be admissible under the Confrontation Clause, . . . hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. 119 S.Ct. at 1901.

Exactly what does this mean? As noted, this Court has expressed what factors are not to be used to establish either an "indicia of reliability" or the "guarantees of trustworthiness." This Court has not articulated what these are. It appears that the above statement in *Lilly*, which was taken from *Wright*, specifies that the indicia of reliability are to be deduced from the hearsay evidence itself, implying that the circumstances surrounding the making of the hearsay statement are to be considered. Yet, *Lee* rejects an approach which looks to the voluntariness of the codefendant's statement. *Lee*, 106 S.Ct. at 2064. Thus, the above statement from *Lilly* can be interpreted only as providing that the Confrontation Clause of the Sixth Amendment permits the admission at a defendant's trial of a codefendant's genuinely self-incul-

patory statement which was obtained under circumstances which support its verity, that is, that the codefendant was particularly likely to be telling the truth when the statement was made. Based on this reading of the Confrontation Clause, codefendant Rhoden's genuinely self-inculpatory statement, which also implicated Respondent in the shooting death of Paul Foster, was properly admitted at the Respondent's trial.

The confession of the non-testifying codefendant Rhoden was admissible, contrary to the Illinois Appellate Court's opinion (App. B at 26-27), under the Confrontation Clause because it possessed the requisite sufficient guarantees of trustworthiness to make this statement admissible notwithstanding the lack of an opportunity for Respondent to cross-examine Rhoden. The independent aspects of codefendant's statement which provide the necessary "guarantees of trustworthiness" of that statement and which render Rhoden particularly worthy of belief are found in the totality of the circumstances surrounding the making of the statement by Rhoden. *Wright*, 110 S.Ct. at 3148-49.

Although Rhoden was in custody at the station prior to being questioned by police about Foster's murder, he was in custody on a totally unrelated matter, a Class A misdemeanor. (R. 858). The decision to question Rhoden about Foster's murder was not made because police believed that Rhoden was involved in the shooting or that he was a suspect. (R. 587, 593, 835, 927). The police viewed Rhoden at the time simply as someone from a rival street gang who could provide police with needed information on gang activity that had occurred between the Vice Lords and the Gangster Disciples the day prior

to the Foster shooting. (R. 588, 593, 835, 858, 927). The police already knew about the physical altercation between the Gangster Disciples and certain members of the Vice Lords which had occurred on June 9 and 10, 1997. (R. 258, 323, 325, 429, 831, 927). The police also knew about the gang turf wars being waged in the area, including the corner where the victim's home was located. (R. 293-97, 307). Prior to the questioning of Rhoden about the Foster murder, police already had questioned not only several members of the Gangster Disciples (C. 121-36, 250-56; R. 807, 818-19, 821-23, 825, 843, 857, 919-20, 923, 949), but also other individuals. (R. 807-12, 844-45, 856-57, 919, 933). It just so happened that Rhoden was the first Vice Lord whom police came across and had the chance to interview about the gang problems. (R. 858, 927). However, Rhoden was not a suspect in Foster's death at the time. (R. 587, 927).

The initial questioning of Rhoden focused on the events of June 9 and 10. (R. 586, 927-28). In fact, it was Rhoden's presence at the public housing project after this altercation on June 10 which led to his arrest and presence at the station. (R. 858, 927). The questioning of Rhoden was open-ended and not leading since police were trying to obtain as much information as possible. Rhoden was not under the influence of alcohol or drugs at that time. Rhoden provided a history of what had transpired which led to the eventual altercation on June 10, 1997. (C. 261). Rhoden told police that he believed that the police already had the shooters under arrest, Lewis and Davis. (R. 588).

After taking a break, police advised Rhoden of his *Miranda* rights, as the police believed Rhoden had some

direct knowledge about Foster's murder. (R. 584, 587, 858). After additional questioning about the events of the preceding day, Rhoden stated that he was not involved in the murder of Foster. (R. 589). Rhoden was then questioned about his whereabouts after the fight on June 10, 1997. After the police recapitulated the information which Rhoden had given police, Rhoden stood up and said, "It wasn't me by myself, don't make it like I did it by myself." (C. 261; R. 589-90). After some additional questioning, Rhoden gave police a self-inculpatory statement, admitting his involvement in the shooting incident which resulted in Foster's death. (C. 262). In the process of admitting his own guilt for the murder of Foster, Rhoden inculpated Respondent Quick and codefendant Jeremiah Jamison. (C. 263-70; R. 846). Rhoden's oral statement was followed with the taking of his taped statement. (C. 263-70). Rhoden had been questioned for about one hour and forty minutes when he admitted his involvement in the Foster incident. (R. 593-94, 859). No promises of any sort were made or given in exchange for Rhoden's statement (R. 583) albeit that the matter of Rhoden's cooperation was briefly broached. (R. 585-86). It does not appear that Rhoden envisioned any such favorable treatment, especially given his subsequent refusal to testify at Respondent's trial although given use immunity.

The totality of the circumstances surrounding Rhoden's confession to police reveals that Rhoden's truthfulness is so clear that the use of cross-examination would have been of marginal utility. *Wright*, 110 S.Ct. at 3149. Clearly, the statement given by Rhoden to police was a genuinely self-inculpatory admission of his involvement in the

shooting incident which left Foster dead. A reasonable person in Rhoden's position would not have made such a statement unless he believed it to be true, since Rhoden was fully implicating himself in the murder of Foster, making Respondent legally accountable for murder. *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 2436-37, 129 L.Ed.2d 476 (1994). Under *Wright*, 110 S.Ct. at 3150, additional reliability factors presented in this case include the fact that Rhoden provided a consistent account between his oral and taped statements as to how the events unfolded that resulted in Foster's death. Rhoden was not under any duress or mental incapacity at the time he confessed. In addition, Rhoden, Jamison, and Respondent all belonged to the same gang, thereby eliminating any motive Rhoden might be said to harbor, that is, to inculpate Respondent in the shooting of Foster because Respondent belonged to a rival gang. If anything, Rhoden's motive would have been to lead the police away from suspecting either him or his fellow gang members, Jamison or Respondent, which is exactly what Rhoden did at first.

It is also significant that no heavy-handedness on the part of the police is evident of record. The circumstances under which the encounter between police and Rhoden came about is indicative of the overall general reliability of codefendant's statement. More importantly, Rhoden's demeanor and comportment, which is objectively reviewable from his tape-recorded statement, decisively adds to the reliability and trustworthiness of his statement. It can be discerned from his taped statement that Rhoden made a genuinely self-inculpatory statement, admitting to his role in the incident that resulted in Foster's death

and making him criminally accountable for that homicide. The genuineness of these inculpatory admissions, and thus their corresponding reliability, is gleaned from Rhoden's recitation that all that he and the others ever intended was to scare the Gangster Disciples, not to kill anyone. While Petitioner acknowledges this Court's concern that a major problem infecting the reliability of a non-testifying codefendant's statement is the declarant's motive to curry favor with the prosecution thereby leading the declarant to implicate a defendant while exonerating himself (*Lee*, 106 S.Ct. at 2062), this concern is noticeably absent here. Unlike in *Lee*, and in *Lilly*, that fear is absent here because the taped statement itself depicts that Rhoden never made an effort to exonerate himself from criminal responsibility, to shift the blame of the shooting from himself to Respondent, or otherwise to implicate Respondent to any greater extent. (See Rhoden's statement). That Rhoden's statement detailed the conduct of the other two participants is but a byproduct of his recounting of the entire incident. That Rhoden named Respondent as the shooter is a fact, a fact that is accurate and truthful. Unlike *Lilly*, that Rhoden's statement to police was accurate and truthful when given is further substantiated by the statement of codefendant Jamison, which was admitted at Respondent's trial through the testimony of Jamison, in which Jamison corroborated Rhoden's statement on all material points, including that Respondent was the one who fired the gun. (R. 478-90). Compare, *Lee*, 106 S.Ct. 2064-65.

Under these circumstances, particular and adequate "guarantees of trustworthiness" were adduced which established the existence of the requisite sufficient in-

dicia of reliability needed to rebut the presumptive unreliability of the codefendant's statement which implicated Respondent. This case is distinguishable from *Lilly*, as pointed out throughout Petitioner's petition. Respondent's rights under the Confrontation Clause of the Sixth Amendment were not violated by the admission of the non-testifying codefendant's hearsay statement at Respondent's trial.[1] Accordingly, Petitioner requests that this Court grant them *certiorari* to review the Confrontation Clause issue addressing the admissibility of a non-testifying codefendant's statement and to definitively rule that a genuinely self-inculpatory statement of a non-testifying codefendant implicating a defendant can possess sufficient guarantees of trustworthiness to satisfy the constitutional requirement that such a hearsay statement possess adequate indicia of reliability to be admissible at a defendant's trial.

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[1] Petitioner is aware that this Court has ruled that Confrontation Clause errors are subject to a harmless error analysis. *Cruz*, 107 S.Ct. at 1719; *Wright*, 110 S.Ct. at 3151; *Lilly*, 119 S.Ct. at 1901. The Illinois Appellate Court conducted a Confrontation Clause harmless error analysis, concluding that the error was not harmless. (App. B. at 27-28). Petitioner contends that, since the Illinois Appellate Court already has considered the harmless error issue in the first instance, this Court may now review the propriety of that determination by the Illinois Appellate Court. See, *Lilly*, 119 S.Ct. at 1901. Petitioner maintains that the Illinois Appellate Court's harmless error ruling is erroneous and should be reversed.

CONCLUSION

For the reasons and arguments stated herein, Petitioner respectfully requests that a writ of *certiorari* issue to the Illinois Appellate Court, Third Judicial District, to review that court's decision which reversed the trial judge's determination that the statement of the non-testifying codefendant, Derrick Rhoden, which contained adequate guarantees of trustworthiness, was substantively admissible at Respondent's trial notwithstanding Respondent's inability to cross-examine the out-of-court declarant.

Respectfully submitted,

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